

Executive Secretariat Controlled Correspondence

From JOHN G. ROBERTS, DAG		To AG		Control Number 82-06-18-1001
Subject and Date 06-16 MEMO TO AG FM JOHN ROBERTS, REGARDING NEED FOR GREATER COORDINATION BETWEEN CRT AND OSG W/RESPECT TO DEVELOPMENT OF DOJ POSITIONS BEFORE THE SUPREME CT. IN CASES REFERRED BY THE EEOC.				Date Received 06-18-82
(1) Referred To DAG; STARR	(2) Referred To	(3) Referred To	(4) Referred To	Interim Response
Date 06-18-82	Date	Date	Date	Date
Prepare Reply for Signature of NONE				Date Released 06-23-82
Remarks REC'D 06-17-82; LOGGED 06-18-82 06-23-82 retd to Exec. Sec. with note: "6/22/82 Agreed" Original filed and copies given to Kuhl, Roberts.				File St Memos <input type="checkbox"/>
				Priority <input type="checkbox"/> (Explain in Remarks)

ORIGINAL (KEEP WITH INCOMING CORRESPONDENCE)

FORM DAG-47
APR. 82

Memorandum



Subject	Date
Solicitor General Briefs in EEOC cases	June 16, 1982
To The Attorney General	From John Roberts <i>JR</i>

Recent events indicate the need for greater coordination between the Civil Rights Division and the Solicitor General's office with respect to the development of Department of Justice positions before the Supreme Court in cases referred by the Equal Employment Opportunity Commission (EEOC). EEOC has responsibility for private employment discrimination, while our Civil Rights Division has parallel responsibility for public employment discrimination. The Civil Rights Division and EEOC frequently rely on the same statutes and regulations, and the issues which arise in EEOC cases are in most instances identical to the issues arising in Civil Rights Division cases. When an EEOC case goes to the Supreme Court, the Solicitor General's office typically works off a draft prepared by EEOC, and only intermittently consults with the Civil Rights Division concerning the position to be taken in the case. Thus, a Department of Justice position before the Supreme Court is developed without the advice of the Civil Rights Division, even though the issues are of great significance to the Civil Rights Division. For a variety of reasons the Solicitor General's office cannot be considered sufficiently sensitive to the policy views of the Civil Rights Division. Therefore, the end result is that Department policy in the civil rights area is not sufficiently addressed when the Solicitor General's office presents arguments on behalf of EEOC.

This is not merely a theoretical problem. This term two cases referred from EEOC presented significant issues in the civil rights area. In each instance, the Solicitor General's office, in consultation with EEOC, presented arguments to the Supreme Court which were totally inconsistent not only with general Administration policies but with specific and announced priorities of your own. In the American Tobacco case, the Solicitor General's office and EEOC presented an argument that would have expanded the effects test in employment cases -- despite the clear philosophical opposition to the effects test by the Department, most clearly articulated in the voting rights area. In the

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Agreed.

Kremer case, the Solicitor General's office and EEOC argued against federal courts giving res judicata effect to state court determinations in discrimination cases -- despite the clear thrust by the Department to enhance and respect state courts and encourage finality in litigation. Fortunately, the Solicitor General's office and EEOC lost in these cases, each time by a vote of 5-4. This in itself demonstrates that the arguments presented by the Solicitor General's office were in no sense compelled by the law.

I think it would be helpful in avoiding such problems in the future if the Civil Rights Division were fully involved in EEOC cases reaching the Solicitor General's office. The issues often overlap, and the policy input of the Civil Rights Division is needed. Neither EEOC nor the Solicitor General's office itself satisfies the concern that the policy objectives of the Department be addressed. I recommend that you direct the Solicitor General's office to keep the Civil Rights Division fully advised of all EEOC filings, and to solicit their views as they would in a case coming from the Civil Rights Division itself.

cc: Ken Starr
Carolyn Kuhl